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Supreme Court of the United States

October Term, 1960

No. 387

ARMCO STEEL CORPORATION,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE, CLARENCE W. LOCK, Commissioner, substituted for Louis M. Nigro,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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ARMCO STEEL CORPORATION,

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STATE OF MICHIGAN, DEPARTMENT OF REVENUE and CLARENCE W. LOCK, Commissioner (substituted for Louis M. Nims),

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

I.

Appellees' motion seeks to dispose of the case on the merits.

Appellees' motion does no more than attempt to show that the federal questions presented are foreclosed by prior decisions of this Court.[1] It is submitted, as hereinafter demonstrated, that such is not the fact. Therefore,

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[1] There is no suggestion in Appellees' Motion to Dismiss or Affirm that the federal questions alleged by Appellant were not timely or properly raised or expressly passed upon by the Michigan Supreme Court; or that the decision of the Michigan Court rests on an adequate non-federal basis; or that the decision is sustainable on grounds other than those involved in the questions that are presented. Neither do Appellees argue that the questions presented are not important.

Appellees' motion should be denied and decision of this case on the merits made only after briefs and oral argument.[2]

II.

Introduction to argument.

Appellees' argument on the merits fails because:

(a) Appellees' claim that Appellant's activity in Michigan amounts to more than mere solicitation of orders and that numerous decisions of this Court uphold taxes on local activities and taxes on gross receipts from interstate commerce depends for its validity on an over exaggeration of Appellant's Michigan activities and citation of cases involving obviously different types of taxes and activities. This argument further demonstrates Appellees' attempt to ride two horses; *i.e. to* categorize the tax as one on activities for some purposes and as a tax on receipts for other purposes.

(b) Appellees' claim that the only issue is the constitutionality of the imposition of a tax on apportioned "adjusted receipts" or "income" of a foreign corporation conducting *local* activities, by use of meaningless words such as " income" or "adjusted receipts", ignores the constitutional issues raised in Appellant's Jurisdictional Statement. As pointed out therein, the fact is that the starting point for the computation of this tax is Appellant's receipts from all sources whether or not related to Michigan, and 50 per cent of such gross receipts are arbitrarily divided for tax purposes. Furthermore, Appellant's activities are

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[2] If the questions require analysis or exposition for their determination the motion should be dismissed. See *Wilheim v. Moffatt Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, 43 S. Ct. 694 (1923).

not local in the sense of being distinct and severable from interstate commerce.

(c) Appellees' claim that the apportionment formula prevents multiple or discriminatory burdens completely ignores the constitutional issue inherent in the fact that the base to which apportionment is applied is a forbidden one; and by so ignoring, Appellees rely on cases involving *net* income taxes, franchise taxes, or cases that allocate the entire receipts of a taxable transaction to the place where the *local* activities generate the receipts. In no case known to Appellant's counsel, and certainly in none of the cases cited by Appellees, has this Court ever passed upon the use of a three factor apportionment formula in connection with a tax of this nature nor has it ever passed upon the constitutionality of allocating receipts in the sales fraction to destination point. Appellees' apportionment argument again begs the constitutional issues here presented by assuming that there is no difference between the tax in question and other taxes such as net income or franchise taxes.

(d) It is not true that the Michigan Supreme Court conclusively determined that the statute in question had the effect of imposing a tax on "income" or "adjusted receipts" attributable to Michigan sources. As pointed out in Appellant's Jurisdictional Statement (pp. 14, 15) the Michigan Court made no clear cut finding as to the incidence of this tax and Appellees' motion itself is equivocal as to incidence; *e.g.*, "activities" (p. 5); "adjusted receipts or income" (p. 19); "activities and adjusted receipts" (p. 24).[3]

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[3] All page numbers contained in this brief and shown thus (p. .....) are references to Appellees' motion unless otherwise indicated.

(e) Appellees' claim that a federal question can be raised only by showing (1) that the questioned tax is imposed on the privilege of engaging in interstate commerce, and (2) that the measurement of the tax is unreasonable is so obviously inaccurate as to require no refutation. The same is true of the Appellees' claim that the decision of the Michigan Court as to the operative effect of this tax is conclusively binding on this Court.

III.

Appellees exaggerate the facts.

Appellees seek by over-emphasis of facts and restatement of the issues to a single issue couched in sterile and meaningless terms such as "income" and "gross receipts" to show that this case is governed by net income tax cases or in the alternative, by cases that have validated taxes on gross receipts allocable by source to local activities separable and distinct from interstate commerce. There can be no argument that the tax in question is not a net income tax, and indeed Appellees make no such argument, although they seek support from the net income tax cases.

Appellees' motion (pp. 12, 18) is devoted to a repetitious statement of alleged facts. Pages 8 through 10 are devoted to a slanted interpretation of these alleged facts. Decision in this case was entered on the pleadings without an opportunity to present evidence. Contrary to Appellees' claim (p. 12) that their statement of the case is uncontroverted fact, Appellant's affidavit of merit described the statements relied on by Appellees as "misleading" and "inaccurate".[4] Many of the allegations are obviously

[4] Certified Record, Paragraph 11 on Page 5 of Affidavit of Merits of Murray B. Wilson, in Opposition to Motion for Summary Judgment.

hearsay or matters of opinion. Whether these are facts or hearsay or Appellees' slanted interpretation of facts, there is no dispute about the following:

APPELLANT DOES NOT

(a) engage in any manufacturing or processing in Michigan.

(b) maintain any stock of goods in Michigan.

(c) conclude any contracts in Michigan.

(d) deliver any goods or transfer title to its products in Michigan.

(e) own any property in Michigan, except for office furniture of a nominal value in its sales office (on which it pays an ad valorem tax).

(f) make any sales in Michigan.

Furthermore, disregarding the exaggeration in Appellees' motion, it cannot be gainsaid that Appellant's Michigan activities determined by reference to payrolls represent less than 1/10 of 1% of its total activities and involve not more than 1/40,000 of its property.

Appellees (p. 8), by mathematical manipulation, endeavor to disprove Appellant's claim that the tax in question, as applied to Appellant, is indistinguishable constitutionally from a gross receipts tax. In their attempt to prove that there is no direct relationship between the tax imposed and gross receipts from shipments into Michigan, Appellees (p. 10) allege a difference in the ratios between tax and gross receipts for 1954 and 1955. This inaccurate allegation results from the fact that Appellees attempt to compare incomparables. The three fractions making up the formula for the 1954 computation are determined for the full calendar year. In the computation for the year 1955, the Michigan destination sales fraction is broken into two six-month periods and the fraction for

each six-month period is averaged with the full calendar year property and payroll fractions. If the tax rate of .004 is applied to the entire year for 1955 and receipts from Michigan destination sales are combined into a full calendar year in the numerator of the sales fraction so that the fraction corresponds to the same calendar year as the other fractions, the ratio for the year 1955 is .0006742 as against .0006704 for 1954, a difference of less than .000004 (4 millionths). and a difference[5] insufficient upon which to base a legal argument. There can be no serious contention that the "practical operation"[6] of the tax in question as applied to Appellant is directly related to receipts from interstate shipments into Michigan, or on payroll and property imported into Michigan, as hereafter shown. And since the tax applies whether or not there is profit it is also clear that Michigan exacts its tribute from each dollar of gross receipts, whether from shipments interstate into Michigan or wholly unconnected with Michigan.[7]

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[5] This microscopic variation results from the averaging of infinitesimal payroll and property fractions with the only fraction having any substance, namely, gross receipts from Michigan shipments over total receipts from everywhere. To say that the payroll and property fractions act to reduce the interstate sales fraction to an amount related to Michigan activity permits the tail to wag the dog.

[6] *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, 85 L. ed. 267, 270, 61 S. Ct. 246, 249 (1940).

[7] Appellees attempt to prove (p. 10) that the tax is related to Michigan activities by showing that the tax exacted would be more than three times as great if Appellant's activity took place entirely within Michigan. It is difficult to conceive of an argument more calculated to prove that the tax is not related to Michigan activities. Is it not crystal clear that if an hundredfold increase of activity and property will increase the tax only three-fold, the computation Appellees seek to sustain must perforce be taxing out-of-state activities and transactions? Equally abortive is the attempt on the same page to justify the tax on the ground that approximately 3% of adjusted receipts are subjected to the tax rate. This 3% considered in light of the uncontroverted fact that less than 1/10 of one per cent of Appellant's payroll and property are connected with Michigan reflects a thirty-fold overreaching.

IV.

The authorities cited by Appellees are not controlling of this case because they involve different activities and different forms of taxation.

Space does not permit the individual discussion of the irrelevancy of each of the cases cited by Appellees. Therefore they will be discussed by class with general comment on the irrelevancy of each class.

It is not sufficient for Appellees to say that the *activities* in the cases cited (p. 20, footnote 15) are indistinguishable from the activity in the instant case if, as is the fact, the *taxes* involved in those cases are distinguishable. For example, *B. F. Goodrich Co.* v. *Washington*, 38 Wash. 2d 663, 231 Pac. 2d 325, cert. den. 342 U. S. 876, 96 L. ed. 659, 72 S. Ct. 167 (1951), involved a tax upon the business of making sales at wholesale. The taxpayer made sales at wholesale, maintained warehouses in the taxing state and was engaged in a wholesale operation from warehouses to ultimate purchasers in the State of Washington.[8] Of equal importance, is the fact that while the instant tax deals with receipts from everywhere, the tax in *Goodrich* dealt only with Washington connected sales.

The similarity of Appellant's activities to those of the taxpayers in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, (1959), is not dispositive of present issues in view of the obvious difference of the taxes in the two cases. Comparison of activities in light of dissimilar taxes is a *non-sequitur*.[9]

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[8] Contrary to Appellees' statement, these activities are more extensive and therefore distinguishable from the activity at issue.

[9] *E.g.*, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 508 (1951); *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436 (1938).

And it is not true that Appellant's local Michigan activities are as extensive as those of the taxpayers in other cases cited at pages 19 and 20 of Appellees' motion. For example, in *Berkshire Fine Spinning Assoc. City of New York*, 184 N. Y. S. 2d 623, Appeal dismissed 361 U. S. 3, 4 L. ed. 2d 51, 80 S. Ct, 86 (1959), the taxpayer conducted some part or all of each of the functions of its entire business (except for dyeing processes) within the taxing jurisdiction. More important, in that case, contrary to the instant one, no attempt was made to apportion receipts from sales unconnected with the taxing jurisdiction. Only the receipts from sales of goods shipped into or out of the taxing jurisdiction were dealt with and even those receipts were apportioned before being subjected to tax.[10] The activities involved in *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 95 L. ed. 517, 71 S. Ct. 377 (1951) were all of the activities necessary for the maintenance of a retail outlet including stocking of inventory and all aspects of *local sales* completed in their entirety within the taxing jurisdiction.

It seems unnecessary to point out the obvious distinctions between the instant tax and use,[11] unemployment,[12] sales,[13] franchise[14] and "in lieu of" ad valorem[15] taxes or

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[10] This latter aspect of this case is discussed further at p. 10.

[11] *General Trading Co.* v. *Tax Com.*, 322 U. S. 335, 88 L. ed. 1309, 64 S. Ct. 1028 (1944).

[12] *International Shoe Co.* v. *Wash.*, 326 U. S. 310, 90 L. ed. 95, 66 S. Ct. 154 (1945).

[13] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388 (1940).

[14] *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 91 L. ed. 390, 67 S. Ct. 444 (1947).

[15] *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 3 L. ed. 2d 450, 79 S. Ct. 411 (1959).

other taxes on local activities clearly separable from interstate commerce[16] cited by Appellees in their motion as support for their position.

V.

The application of a three-factor formula does not automatically legitimize a tax.

Appellees would make the fairness of the three-factor apportionment formula the issue in this case and by showing that it has been assumed to be a fair means of apportionment in some cases avoid specific discussion of the due process issue raised by Appellant. Appellant does not rest its case on the bare question of the fairness of a three-factor formula. Whether it produces a fair result when applied to net income[17] or to capital for franchise tax purposes[18] is immaterial to the instant case where, as Appellant claims, the subject to which the apportionment is applied is a forbidden one. Nor is it a valid answer to Appellant's claim that the incidence of the tax is a forbidden one to say that because of an apportionment formula only a part of the forbidden subject is taxed.

As previously noted, this Court has never passed on the constitutionality of such a formula when applied to a

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[16] *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522 (1919) (manufacturing); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548 (1932) (generation of electricity); *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 95 L. ed. 517, 71 S. Ct. 377 (1951), (retail outlet).

[17] The unilateral approval given this formula by the tax collectors (p. 25) was in connection with allocation of net income.

[18] As in cases cited (p. 26, footnote 19) such as *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 91 L. ed. 390, 67 S. Ct. 444 (1947).

taxpayer's gross receipts from all sources. Neither has it expressly considered the constitutionality of the allocation of receipts from interstate shipments to the state of destination for the purpose of determining the sales fraction in a three-factor formula.

Appellant in this appeal challenges the constitutional power of the State of Michigan to tax Appellant's gross receipts, less fifty per cent thereof, derived from all its business wherever transacted, including substantial ($369,267,328 in 1954 and $578,766,128 in 1955) gross receipts from transactions which neither originated nor terminated in the State of Michigan and which, indeed, had no connection whatsoever with the State.

The case of *Berkshire Fine Spinning Assoc.* v. *City of New York*, 184 N. Y. S. 2d 623, Appeal dismissed, 361 U. S. 3, 4 L. ed. 2d 51, 80 S. Ct. 86 (1959), and one of the cases upon which Appellees' motion principally relies[19] exposes the fallacy of reliance on the apportionment formula as the saving grace of the tax here in issue. In the first place, *Berkshire* expressly left open the question of the fairness of the allocation formula. More important, in that case the taxing authorities apportioned only receipts from goods shipped into or out of New York.[20] There the tax computation employed a category designated as "non-allocable" or "non-taxable" receipts, i.e., receipts from sales transactions where both the shipping and delivery of the goods

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[19] Cited 5 times in Appellees' motion.

[20] Both *Field Enterprises, Inc.* v. *Washington*, 47 Wash. 2d 852, 289 Pac. 2d 1010, aff'd 352 U. S. 806, 1 L. ed. 2d 39, 77 S. Ct. 55 (1956) and *B. F. Goodrich Co.* v. *Washington*, 38 Wash. 2d 663, 231 Pac. 2d 325, cert. den. 342 U. S. 876, 96 L. ed. 659, 72 S. Ct. 167 (1951) cited frequently by Appellees dealt only with receipts from Washington sales. Appellees' reliance on these cases reflects a refusal to recognize the difference between these taxes, which deal only with receipts related to the taxing state (in fact allocated to the source), and the scope of the Michigan tax where the starting point is receipts from everywhere and which extracts a tribute from every gross receipts dollar.

took place outside of New York. Before attempting to determine the receipts subject to tax, these non-allocable or non-taxable receipts were eliminated. No attempt was made to allocate receipts from sales wholly unconnected with New York.

The argument was strenuously made in the Michigan Supreme Court that the plain language of the Michigan Statute apportions only those receipts derived from Michigan activity. That argument was rejected and it was held that the intention was to apportion receipts from all sources, whether or not connected with Michigan.

VI.

This appeal does present substantial federal questions that merit the consideration of this Court.

Appellant submits that because of the particular relationship of the parties, the tax in this case produces forbidden results; that because the subject apportioned is a forbidden subject, the apportionment formula will not save the tax; that in practical operation, as applied to Appellant, the tax is indistinguishable from a gross receipts tax and therefore is a direct burden on interstate commerce; and finally, that the attempt by the State to subject to apportionment 50% of gross receipts from sales unconnected in any way with the State of Michigan is an unconstitutional exercise of the State's taxing authority forbidden by the due process clause.[21]

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[21] Appellant does not contend, as claimed by Appellees (p. 11), that it can carry on Michigan activities and derive receipts from Michigan sources without paying any taxes to recompense the State for the protection, benefits and privileges accorded by it. The issue is not whether the State can impose a tax on Appellant. Rather the issue is whether the State can impose this particular tax on Appellant in the manner and amount complained of. Appellant pays without argument ad valorem property taxes levied on its property in Michigan.

Briefly stated, authority supporting Appellant's position as outlined in the preceding paragraph includes:

(a) Appellant's activities within the State of Michigan are integral and inseparable incidents of interstate commerce.[22] Solicitation of orders for sale of goods is part and parcel of interstate commerce.[23] That Appellant's method of soliciting business is more elaborate than door to door solicitation has no constitutional significance.[24] The maintenance of a local office does not change the interstate character of the activity.[25]

(b) Taxes on gross receipts from interstate commerce are forbidden direct taxes.[26] The effect, except for the

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[22] The decision of the Michigan Court is not contrary to this statement.

[23] *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694, 7 S. Ct. 592 (1887); *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424 (1952).

[24] *Nippert* v. *City of Richmond*, 327 U. S. 416, 90 L. ed. 760, 66 S. Ct. 586 (1946); *General Trading Co.* v. *Tax Comr.*, 322 U. S. 335, 88 L. ed. 1309, 64 S. Ct. 1028 (1944).

[25] *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, 62 L. ed. 632, 38 S. Ct. 295 (1918); *Ozark Pipeline Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184 (1925); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357 (1959); *Williams* v. *Stockham Valves & Fittings, Inc.*, 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357 (1959).

[26] *State Freight Tax Cases*, 15 Wall. 232, 21 L. ed. 146 (1872); *Fargo* v. *Michigan*, 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857 (1887); *New Jersey Bell Tel. Co.* v. *Tax Board*, 280 U. S. 338, 74 L. ed. 463, 50 S. Ct. 111 (1930); *Pullman* v. *Richardson*, 261 U. S. 330, 67 L. ed. 682, 43 S. Ct. 366 (1923); *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 67 L. ed. 1095, 43 S. Ct. 643 (1923); *Railway Express Co.* v. *Virginia*, 347 U. S. 359, 98 L. ed. 757, 74 S. Ct. 558 (1954); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 91 L. ed. 993, 67 S. Ct. 815 (1947); *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274 (1946); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913 (1938); *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608 (1936); *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 32 L. ed. 229, 8 S. Ct. 1127 (1888); *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 88 L. ed. 1304, 64 S. Ct. 1023 (1944).

amount, of a tax on 30% of gross receipts is indistinguishable legally from a tax on total gross receipts. One cannot examine the figures relied on by Appellees (pp. 8-9) without being struck by the fact that the dominant element, in fact the only significant figures, are gross receipts. The starting point of the computation is gross receipts from everywhere. The numerator of the dominant fraction in the apportionment formula is gross receipts from shipments into Michigan, and the denominator of that fraction is gross receipts from sales and shipments everywhere.

> "* * * a tax is as much a tax on the measure as it is a tax on the so called subject. A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."[27]

(c) Apportionment does not avoid the basic unconstitutionality of the tax.[28]

(d) There is no sanction in the decisions of this Court for apportionment of receipts in the manner attempted by the statute in question. The commentators in the field conclude that such apportionment is not possible.[29] Justice Black's dissent in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 327, 82 L. ed. 1365, 1378, 58 S. Ct. 913, 923 (1938), contains the unequivocal declaration that a state lacks power to apportion gross receipts from interstate commerce.

(e) Seldom before in its history has this Court been faced with such a bold and extensive legislative scheme to

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[27] *Professor Elvin E. Overton*, U. of Tenn. Law College, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242, Winter '60.

[28] *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218 (1912).

[29] *Powell*, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev. 710, 743; *Altman & Keesling*, Allocation of Income in State Taxation (2d ed. 1950), Par. 25, 26.

reach out beyond a state's boundaries to tax activities having neither "nexus" nor even a remote connection with it.

It is recognized that the sales factor in an apportionment formula is a convenient device for shifting taxes.[30] But the sole function of an apportionment formula should be to determine objectively what values lie within the permissible scope of a state's taxing power.

Michigan, for purposes of its gross receipts type tax, seeks to import into its taxing jurisdiction a portion of each dollar of Appellant's receipts from all sources by use of an apportionment formula which combines such unrelated and dissimilar factors as property and payroll with gross receipts from all sales everywhere. An apportionment formula using in-state property and payroll measures receipts allocable to those activities for tax purposes to recompense the state for the benefits enjoyed by those activities. This case does not involve Michigan sales, so that no claim can be made that the shipments into Michigan reflect either Michigan receipts or Michigan activity beyond that reflected by the payroll and property factors. By no stretch of the imagination can apportionment on the basis of receipts from out-of-state shipments to points within the state be considered to be anything but the impor-

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[30] "An analysis of the statutes and regulations of the states employing such corporate taxes reveals eleven different formulas, which are composed of one or a combination of eight different factors. The substantial lack of uniformity in the provisions has apparently resulted because of the desire of each state to devise a formula and define the factors included therein in a manner most advantageous, taxwise to itself." *Hartman*, State Taxation of Corporate Income, 13 Vand. L. Rev. 21, 65.

"The most vexatious problems in connection with the apportionment factors lie in these varying definitions of the 'sales' factor. Here is to be found the largest source spring for multiple taxation." *Ibid*, at p. 74.

See *Rhinelander & Wollen*, note State Taxation of Interstate Commerce, 46 Va. L. Rev. 297, 320, showing how varying definitions of the sales factor can result in multiple taxation of income.

tation into the state of extraterritorial values. Such receipts can have no additional relation to Michigan because of the bare fact of shipment into the State. Apportionment by fractions representing Michigan payroll and property have already fully utilized the only in-Michigan activities and in-Michigan aspects related to shipments into the State to which Michigan can extend its privileges, protection and benefits. Consequently, there is no more in-state activity to be reflected by the so-called sales factor. This factor constitutes plainly and simply the taxation of receipts earned outside the territorial boundaries of Michigan by capital and labor employed outside that state.

When it is recognized, as it must be, that if Appellant had no activity in Michigan the state could not tax any of Appellant's receipts merely because of shipments into the State, the gross unreasonableness of taxing millions of its dollars just because 1/10th of 1% of its payroll and 1/40,000 of its property is located there becomes apparent.

Simple arithmetic makes it self-evident that the tax, using the arbitrary 50% deduction, is imposed on extra state values if it is compared with a tax computed by deducting expenses and costs attributable in fact to activities actually taking place outside of Michigan (including payroll and depreciation on personal property). This latter computation produces a tax of $6,360.00 in round numbers for the year 1954. This is a graphic demonstration that the assessed tax of $25,084.00 for 1954 contains over $18,000.00 attributable to out-of-Michigan activities (payroll) and property. A corresponding situation prevails in respect to the 1955 tax.

In light of these figures, any argument that the tax is a fair exaction for the benefits and protection afforded by Michigan misses the mark, for Michigan affords no benefits or protection to the employment function reflected by non-Michigan payroll or by property outside Michigan. And, as

demonstrated above, the payroll and property factors reflect completely the receipts or activities related to the shipments into Michigan.

Rather than the "scintilla of evidence" of unreasonableness which Appellees' motion demands, Appellant submits that the apportionment formula is so palpably unfair and unreasonable on its face that it requires no proof.

Conclusion.

Space at this stage of the proceedings will not permit full elaboration of reason and authority supporting Appellant's position. This is more properly left to briefs on the merits and oral argument and it is respectfully requested that Appellant be given opportunity to submit such briefs and argument.

For the reasons above stated, Appellees' Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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